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**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

Order Instituting Rulemaking on the
Commission's Natural Gas and Electric Safety
Citation Programs.

Rulemaking 14-05-013
(Filed May 15, 2014)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) OPENING COMMENTS
TO PROPOSED PHASE II DECISION

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Opening Comments To Proposed Phase II Decision
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TO PROPOSED PHASE II DECISION**

I.

INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure, Southern California Edison Company (SCE) submits the following comments on the PHASE II PROPOSED DECISION ADOPTING NECESSARY IMPROVEMENTS AND REFINEMENTS TO THE GAS AND ELECTRIC SAFETY CITATION PROGRAMS, dated August 29, 2016 (PD). SCE fully understands and supports the focus of the Commission in ensuring that California's electric and gas delivery systems are operated safely and in accordance with the Commission's construction, operating and maintenance standards. And SCE also fully understands that in appropriate cases, penalties for violations of the Commission's standards should be imposed. Accordingly, these comments are not offered for the purpose of avoiding such penalties where merited; instead SCE's comments go merely to the issue of drawing the right boundary between when an administrative staff-issued citation is appropriate and when the imposition of significant penalty amounts should remain subject to the traditional procedural due process protections afforded by the current OII process.

As required by Rule 14.3, these comments “focus on factual, legal or technical errors” in the PD. Specifically, SCE identifies the following errors:

- The Proposed Decision errs in adopting a \$50,000 minimum penalty, an amount not supported by the record and inconsistent with the exercise of discretion that the governing statute on penalties contemplates.
- The Proposed Decision errs in defining “Self-Identified Potential Violations” to include violations caused by “anyone” including communications infrastructure providers.
- The Proposed Decision errs in adopting an administrative limit of \$8 million per citation, an amount not supported by the record and that does not meaningfully respond to the legislature’s intent that the Staff’s citation authority be subject to a meaningful administrative limit.
- The Proposed Decision errs in finding that workshops are not needed and would not be useful.

II.

COMMENTS

A. **The Proposed Decision Should Be Modified To Permit Commission Staff To Assess Penalties At An Amount That Is Below The Statutory Maximum Of \$50,000 Per Violation.**

The PD mandates that Staff “shall” assess penalties for each citation at \$50,000 per day.¹ Such a requirement essentially eliminates the element of discretion that is plainly intended by Public Utilities Code § 2107. Under § 2107, utilities can be assessed penalties “of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.” Instead of permitting the Staff to determine a reasonable and proper citation amount geared to

¹ PD at 23.

the particular circumstances of an identified violation, as provided for in § 2107, the PD would remove any meaningful discretion by mandating that only the upper, statutory limit of \$50,000 be available. Adopting a single, available penalty rate would be legal error as it conflicts with the language and intent of § 2107.

The PD is also internally inconsistent on the issue of how the Commission Staff (Staff) should assess penalties. First, the PD lists various factors that Staff should consider in determining whether to issue a citation.² For assessing penalties, however, the Staff is given no discretion. Instead, the PD finds that the Staff “shall determine the penalty for each violation at the § 2107 maximum [i.e. \$50,000 per day], with discretion to assess penalties on less than a daily basis (again at the statutory maximum).”³ Yet, the PD also finds: “[w]e require Staff to weigh the criteria set forth in § 6 above [regarding whether to issue a citation] in determining the penalty amounts consistent with the above framework” and acknowledges that the amount to be assessed is a “factual” issue depending on the alleged violation.⁴ Recognizing, on the one hand, that imposing a penalty necessarily involves the exercise of judgment based on the relevant facts and circumstances, but then on the other hand, instructing that the only acceptable penalty amount is the maximum provided by § 2107 is inherently contradictory.

Mandating a penalty amount of \$50,000 is also inconsistent with how the Commission itself has interpreted and applied § 2107. Just last week, the Commission issued a decision assessing a penalty on a utility for violating the terms of a settlement agreement. After evaluating the factors to determine the penalty amount (the same factors Staff is required to consider per the PD), the Commission decided that the appropriate penalty was \$12,500 per violation, for a total penalty of \$25,000.⁵ The Commission assessed the proper amount of the fine after the incident had occurred and thus was able to weigh the particular circumstances of the incident; the

² *Id.*

³ *Id.* at 23.

⁴ *Id.* at 23-24.

⁵ *Decision Setting Penalty for Pacific Gas and Electric Company’s Failure to Comply with a Term in a Settlement Agreement in this Proceeding*, D.16-09-009, Sept. 15, 2016, at 15.

Commission reasoned that the violation at issue “was not severe in that it did not result in physical or economic harm”⁶ and therefore a penalty less than \$50,000 was appropriate. But under the directives of the PD, the Commission would be setting \$50,000 as the proper amount for each *future* violation regardless of the facts or circumstances involved. Last week’s decision highlights the need for Staff to have discretion to assess the appropriate penalty given the specific facts of each violation.

The California Supreme Court has held that its review of Commission decisions “is generally limited to a determination whether the commission has regularly pursued its authority.”⁷ It has also held:

A decision that affects the rights of a party, but has no factual support, would not be one made in the regular pursuit of commission authority and could deny due process. If there is evidence to support the commission's findings, however, the findings are final and unreviewable unless the evidence is undisputed and subject to only one reasonable inference.⁸

Here the Commission has rendered findings on the minimum penalty that are neither based on the record nor “undisputed and subject to only one reasonable inference.” This is legal error. The PD fails to articulate why a mandatory single penalty amount for every citation is appropriate. SCE urges the CPUC to give the Staff discretion in assessing the correct penalty amount for each violation. As acknowledged by the PD, the amount to be assessed will vary depending on the violation and the Staff should be given appropriate latitude in determining an appropriate penalty amount per violation. The factors referenced for reaching a determination regarding whether a citation is to be issued should be similarly considered in determining the

⁶ *Id.*

⁷ *Toward Util. Rate Normalization v. Pub. Util. Comm’n*, 44 Cal. 3d 870, 880, 245 Cal. Rptr. 8, 750 P.2d 787 (Cal. 1988).

⁸ *Camp Meeker Water Sys., Inc. v. Pub. Util. Comm’n*, 51 Cal. 3d 845, 864, 799 P.2d 758, 274 Cal. Rptr. 678 (Cal. 1990).

amount of the penalty. The § 2107 maximum referenced should be just that—the maximum that can be assessed, but not the minimum.

B. The Proposed Decision Should Be Revised To Redefine “Self-Identified Potential Violations” To Remove Violations Caused By “Anyone” Including Communications Infrastructure Providers.

The PD indicates that “Self-Identified Potential Violations” includes “actions by anyone, including a communications infrastructure provider . . . [that] causes a gas or electrical corporation or its facilities to have a potential violation”⁹ It further indicates that “if a communications infrastructure provider causes an electrical corporation’s facilities not to meet GO 95 clearance requirements . . . the electrical corporation (in addition to the communications infrastructure provider) is responsible for complying with these clearance requirements.”¹⁰

Requiring utilities to report such potential violations created “by anyone” is overbroad, arbitrary, not based on the record, and would amount to a taking without just compensation. Utilities cannot control actions taken “by anyone,” including communications infrastructure providers. And creating a system where a utility can be cited and assessed penalties based upon actions taken by an unknown party would violate a utility’s right to due process, especially when notice to the utility is not required. This is especially true when a utility must provide communications infrastructure providers access to its facilities. This finding should be deleted from the PD as erroneous.

The PD also contradicts the Commission’s own General Orders. Holding an electrical corporation responsible for failing to maintain GO 95 minimum clearance based on the actions taken by a non-jurisdictional entity or communications infrastructure provider contradicts the language and intent of GO 95, Rules 12.6 and 32.1. Rule 12.6 states that a utility complies with the GO when it addresses a condition caused by a “third party” within a “reasonable time.” Rule

⁹ PD at 43.

¹⁰ *Id.* at 44.

32.1 states “[w]here two or more systems are concerned in any clearance, that owner or operator who last in point of time constructs or erects facilities, shall establish the clearance required in these rules from other facilities which have been erected previously.” And Rules 31.5 and 91.1 indicate that a utility pole should not be occupied without a utility’s consent and thus, holding a utility responsible for actions taken “by anyone” creating an unauthorized attachment on poles is inconsistent with the aforementioned rules.

The PD states “[h]ow . . . GO 95, Rule 18A interplays with the citation program is beyond the scope of this proceeding”¹¹ Yet, the PD nonetheless ties GO 95, Rule 18-A to the citation program by stating “if a communications infrastructure provider causes an electrical corporation’s facilities not to meet GO 95 clearance requirements . . . the electrical corporation (in addition to the communications infrastructure provider) is responsible for complying with these clearance requirements.”¹² GO 95, Rule 18-A1c states “[w]here a communications company’s or an electric utility’ [sic] actions result in GO nonconformances for another entity, that entity’s remedial action will be to transmit a single documented notice of identified nonconformances to the communications company or electric utility for compliance.”¹³ The PD does not, for example, distinguish a situation where the actions of a communication company cause its communication facilities to come too close to electric facilities and the electric company notifies the communication company of such situation under Rule 18A. Under the PD, the electric company could still be subject to citation, conflicting with Rule 18A. SCE urges the Commission to redefine “Self-Identified Potential Violations” to remove reference to “actions by anyone, including a communications infrastructure provider.”

¹¹ *Id.* at 18.

¹² *Id.* at 44.

¹³ General Order No. 95, Rule 18-A1c.

C. The Proposed Decision’s Administrative Limit of \$8 Million Per Citation Should Be Revised To Reflect A Lower Limit.

The PD arbitrarily sets an administrative limit of \$8 million for each citation. An \$8 million limit far exceeds the type of reasonable administrative limit that is contemplated by SB 291 and PU Code § 2107. SB 291 requires the Commission to “adopt an administrative limit on the amount of monetary penalty that may be set by commission staff”¹⁴ while § 2107 indicates that the assessed penalties should be “not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.”¹⁵ In requiring the Commission to adopt an administrative limit, the legislature undoubtedly recognized in SB 291 that assigning to the Staff a power that had previously been vested solely in the Commission was a significant action that needed to be tempered by the imposition of an appropriate limitation on the Staff’s new authority to ensure fairness and protect the due process rights of parties subject to the citation program.

Significantly, no party proposed an \$8 million administrative limit, and there is no factual record supporting that amount. The PD merely recites recently adopted revenue requirements of several utilities then asserts that \$8 million would be a sufficient deterrent. The revenue requirements of utilities are irrelevant because penalties and fines are borne solely by shareholders. The PD does not explain why the \$250,000 limit SCE proposed or the \$500,000 limit Southwest Gas proposed would not be a sufficient deterrent. The PD’s conclusory finding lacks evidentiary support and adopting it would be legal error.¹⁶

Additionally, under the PD, a utility can be issued multiple “distinct citation(s) . . . regardless of whether the violations occurred in the same incident or are of a similar nature.”¹⁷ Given this statement, the \$8 million limit per citation becomes essentially meaningless as Staff would have the ability to issue multiple citations related to a single incident or circumstance,

¹⁴ Safety Enfr’t: Gas and Elec. Corp., S.B. 291, Cal. Pub. Util. Code §1702.5(a)(3) (2013).

¹⁵ Cal. Pub. Util. Code §2107 (2012).

¹⁶ *Camp Meeker Water Sys., Inc. v. Pub. Util. Comm’n*, 51 Cal. 3d 845, 864 (Cal. 1990).

¹⁷ PD at 80.

each for multiple days and where the issued citations could collectively far exceed the \$8 million limit. SCE urges the Commission to clarify that violations resulting from the same incident or the same general circumstances should be combined into a single citation that would be subject to the established administrative limit. SCE further asks the Commission to adopt the \$2 million dollar limit for any related series of violations similar to the limit used by the Pipeline and Hazardous Materials Safety Administration (PHMSA), as raised by the Scoping Memo and Ruling for Phase II and proposed by Southwest Gas.

D. The Proposed Decision Errs In Finding That Workshops Would Not Be Useful.

The PD states that workshops are unnecessary though it acknowledges that workshops “may be valuable when discussion among the parties can help the parties find common ground and reach consensus or compromise on relevant issues.”¹⁸ The PD provides countless examples of differences of opinion between all interested parties. Regarding “Self-Identified Potential Violations,” the PD also provides an example of a situation where a utility could be issued a citation based on the actions taken by others—as discussed above. These are precisely the issues that should be worked out in workshops.

III.
CONCLUSION

SCE respectfully urges that the Commission consider the four issues raised by SCE in these Comments and adopt a revised decision addressing the errors identified by SCE.

¹⁸ *Id.* at 15.

Respectfully submitted,

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Appendix A

SCE's Requested Changes to the Findings of Fact

SCE's Requested Changes to the Findings of Fact¹⁹

7. Workshops, largely comprised of multiple utility parties and ORA, would ~~not~~ be useful ~~or efficient~~ to further delineate how Staff should weigh the factors listed and discussed in §§ 6 and 7 based in hypothetical situations.

10. It is ~~not~~ useful to further tier penalty levels in workshops, ~~especially when most of the utility participants propose an administrative limit to the overall citation penalty of no more than \$500,000 for a related series of violations. This type of inquiry is better addressed as a factual inquiry, in a particular case or controversy, in light of our adopted citation programs.~~

11. ~~We determine the administrative limit of no more than \$8 million for each citation issued under the gas and electric safety citation programs in exercising our discretion with the goal of establishing a robust citation program which ensures that utilities do not have incentives to make economic choices that cause or unduly risk violations, while providing that the most egregious violations should be presented to the Commission in an OH. The Staff should has the discretion to either address each violation in a distinct citation or to include multiple violations ~~in~~ into a single citation regardless of whether when the violations occurred in the same incident or are of a similar nature. If necessary, we can reexamine this limit once the Commission gains experience with it.~~

13. ~~Given the large revenue requirements of the major energy and gas utilities, the administrative limit we set today is reasonable and achieves the goal of being sufficient enough to ensure that utilities do not have incentives to make economic choices that cause or unduly risk violations which may lead to a citation. We may also initiate an OH for more egregious violations.~~

¹⁹ Requested additions are shown in underlined text. Requested deletions are shown in ~~strikethrough text~~.

16. ~~We agree with the SED Report that further workshops are not needed on the self-identified potential violation issues.~~ As the SED Report points out, workshops can be helpful when there are significant differences of opinion or different levels of knowledge among parties regarding factual issues, and to help the parties find common ground and reach consensus or compromise on relevant-issues. Here, the interested parties on this issue are all utilities (as opposed to a-mixture of utilities and consumer groups, etc.). There is a ~~no~~ significant difference of opinion among the interested parties, ~~who have all been afforded the opportunity to file written comments and replies.~~

SCE's Requested Changes to Conclusions of Law²⁰

1. ~~No w~~ Workshops or hearings are necessary in rendering today's decision which refines the gas and electric safety citation programs.
7. The structure of the citation program in Resolution ALJ-274 (gas) and D.14-12-001 (electric) should be maintained in that Staff shall determine the penalty for each violation ~~at the § 2107 maximum~~, with discretion to assess penalties on less than a daily basis ~~(again at the statutory maximum)~~. We require Staff to weigh the criteria set forth in §§ 6 and 7 of today's decision and in Rules I.A and I.B (Appendix A) in determining the penalty amounts consistent with the above framework.
8. ~~An administrative limit of no more than \$8 million for each citation issued under the gas and electric safety citation programs should be adopted.~~ The Staff should ~~has the discretion to either address each violation in a distinct citation or to include multiple violations in~~ into a single citation ~~regardless of whether~~ when the violations occurred in the same incident or are of a similar nature.

²⁰ Requested additions are shown in underlined text. Requested deletions are shown in ~~strikethrough text~~.